

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4076

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

—v.—

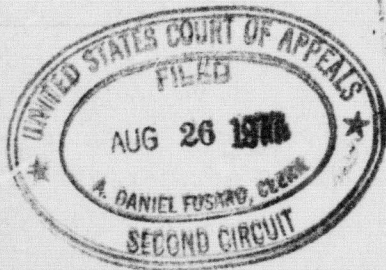
WESTERN ELECTRIC Co., INC.
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

**BRIEF FOR RESPONDENT
WESTERN ELECTRIC CO., INC.**

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**BRIEF FOR RESPONDENT
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Counterstatement of the Issue Presented

Whether the Occupational Safety and Health Review Commission's determination that Western Electric fulfilled the monitoring requirements of the Vinyl Chloride Emergency Standard is (1) supported by substantial evidence and, (2) whether its interpretation of the Standard is unreasonable and inconsistent with its purpose.

Counterstatement of the Case

A. Nature of the Case and Course of Proceedings

This case is before the Court on the petition of the Secretary of Labor pursuant to section 11(b) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590; 29 U.S.C. 651 *et seq.*) to review a decision of the Occupational Safety and Health Review Commission in favor of the employer, Western Electric Co., Inc. (A. 172-184).¹

B. Counterstatement of Facts

Vinyl Chloride (VC), a gas at room temperature, is most commonly polymerized² for industrial use into a plastic resin called polyvinyl chloride (PVC). The polymerization process traps some molecules of VC inside the solid plastic PVC. This trapped gas can escape from PVC at room temperature and its release is accelerated by the application of heat (A. 173 OSHRC).

In April 1974, the Secretary issued an Emergency Temporary Vinyl Chloride Standard restricting employee exposure to VC to below 50 parts per million (ppm) and requiring monitoring to determine whether VC was present in

¹ "A" references are to the parties' appendix. References preceding a semi-colon are to the decision below; those following to the supporting evidence. References to A. 15-17 are to the Secretary's preamble and temporary emergency vinyl chloride standard, 39 Fed. Reg. 12342-44 (April 5, 1974); references to A. 18-27 are to his preamble and permanent standard, 39 Fed. Reg. 35890-98 (Oct. 4, 1974).

² Polymerization is a chemical reaction in which two or more small molecules combine to form larger molecules that contain repeating structural units of the original molecules.

excess of 50 ppm in any work area covered by the standard.³ As the Secretary explained, the Emergency Standard was promulgated to protect employees from the "grave danger" of a rare liver cancer which, on the basis of recent evidence, appeared to be caused by VC exposure (A. 15). The Emergency Standard required an employer to "begin monitoring the ambient air . . . to determine whether it contains vinyl chloride in concentrations in excess of 50 ppm" (A. 16). One method of monitoring—personnel monitoring by a device worn by an employee—was described in the Standard, but it was *not* specified as the only permissible method. The Standard also specified that the gas samples collected for monitoring must be analyzed by a method sensitive to 5 ppm of VC in the air.

Western Electric employs approximately 5,000 employees to manufacture electronic components at its Kansas City Works located in Lee's Summit, Missouri. At the Works, Western Electric maintains an extensive safety program which is coordinated by three full time safety administrators and two full time industrial hygienists (A. 156, A. 174). Administrative Law Judge Dixon found the program "exemplary", and recognized Western Electric's commitment to the safety and health of its employees:

³ The ETS provided in relevant part:

(2) This section does not apply to the handling, storage, or other use of vinyl chloride polymers and copolymers in the form of fabricated products (A. 16).

* * * * *

(c) Monitoring—(1) Initial monitoring. As soon as possible but not later than April 22, 1974, every employer of an employee working in an area or operation in which vinyl chloride is manufactured, reacted, handled, processed, released, repacked, or stored shall begin monitoring the ambient air of the area to determine whether it contains vinyl chloride in concentrations in excess of 50 ppm (A. 16).

"Respondent is highly conscious of its responsibilities to its employees, and this was quite apparent in the testimony of respondent's representatives and that of the compliance officer, who was exceedingly complimentary of respondent's general operations" (A. 164).

In early May 1974, Mr. Widner,⁴ one of the industrial hygienists at the Works began monitoring to assure compliance with the then newly promulgated Vinyl Chloride Emergency Standard (A. 157, A. 174). After examining all the operations in the plant which used PVC, Widner formally monitored by taking air samples of the operation in the plant which would produce the most vinyl chloride—an operation where sheets of PVC were welded together for use as exhaust ducts. His sampling of the welding operation showed that vinyl chloride was present in parts *per billion*, well below the 50 ppm level specified in the Standard (A. 157, A. 174-175).⁵

Subsequently, on May 31, 1974, a Department of Labor Compliance Officer inspected the Kansas City Works for violations of the Occupational Safety and Health Act. In the course of his investigation he monitored a coil coating process for vinyl chloride by taking three air samples (A. 157, A. 175).

The coil coating process where the samples were taken was run approximately once a month in 1973 and 1974. In

⁴ At the hearing the Department of Labor acknowledged Mr. Widner's expertise. He has a degree in Chemical Engineering and has been an Industrial Hygienist at the Kansas City Works for approximately 16 years (A. 96).

⁵ One part per billion is 1/1000 of a part per million (A. 175, n. 4).

this process Western Electric coated wire coils with Hysol, a liquid consisting of 55% PVC particles suspended in a plasticizer. A number of doughnut shaped wire coils, one inch in diameter, were clipped to a rack and then heated in an oven to 360° Fahrenheit. Thereafter, the coils were removed from the oven and immersed in a small tank of Hysol at room temperature for 20 seconds. They were removed from the tank, heated again in the oven for five minutes and then allowed to cool. The tank was covered except when the coils are immersed in it (A. 173-174).

Of the three air samples taken by the Department of Labor, the only breathing zone sample⁶ yielded no measurable concentration of VC when analyzed with a technique sensitive to 0.3 ppm. (The ETS required a technique sensitive to only 5 ppm.) (A. 175 n.5) The two other air samples were not taken from the "ambient air" as required by the Standard but were taken by two sampling tubes placed directly *under the closed lid inside the tank of Hysol*. One sample inside the tank detected *no VC*; the other detected a concentration of 1.7 ppm, well below both the 50 ppm exposure level set by the ETS and the 5 ppm detection limit specified in the monitoring provision.

Mr. Widner subsequently sent a sample of Hysol from the tank to Western Electric's Engineering Research Center near Princeton, New Jersey, where the Hysol was analyzed for VC by means of a gas chromatograph and mass spectrometer, a method admitted by a Department of Labor witness to be superior to the Department's analytic

⁶ The ETS required monitoring only of the "ambient air" of the work area, not the more restrictive sample taken by the Department which was taken from the ambient air which an employee would be expected to breathe.

method (A. 174 n.3, 161; A. 94-95). The analytical chemist at the Research Center who developed the sophisticated technique used by Western Electric to analyze vinyl chloride, subjected the Hysol material to several physical tests which exaggerated the actual coil production conditions at the Works and measured the vinyl chloride that was driven off.⁷ Under those exaggerated conditions, an undetectable amount of VC, if any, was driven off the Hysol. At the time of the analysis, the detection limit of the measuring equipment was .01 ppm, 500 times lower than the 5 ppm set by the Standard (A. 161).

C. Administrative Proceedings and Decision Below

Western Electric was cited for failure to monitor the ambient air of the area surrounding the coil coating process. The citation directed abatement in two days and proposed a \$30 penalty (A. 3-5). Western Electric filed a timely notice of contest of the citation (29 U.S.C. 659(c)). The Secretary issued a formal complaint, Western Electric filed a timely answer and the case was heard before an Administrative Law Judge (ALJ) of the Occupational Safety and Health Review Commission (A. 6-14). The Judge affirmed the Secretary's citation in a decision issued August 14, 1975, but imposed no penalty in light of the Company's "eagerness to be in full compliance with the Act" and since he found respondent "highly conscious of its responsibilities to its employees" (A. 164). The Company sought review by the Commission and it was timely

⁷ First, to exaggerate actual conditions of use, he slowly bubbled helium gas through room temperature Hysol contained in a 150 milliliter flask and directly fed the vapor produced into the gas chromatograph-mass spectrometer (A. 145-146; A. 152). Second, he submerged a flask containing Hysol in water and heated the water (A. 148).

granted (A. 2). The Commission issued its decision on January 24, 1977, reversing its ALJ and concluding that Western Electric had not violated the monitoring requirements of the temporary VC standard (A. 172).⁸

The Commission's majority opinion⁹ recognized that the purpose of the Standard was "to determine whether the [ambient air] contains vinyl chloride in excess of 50 ppm" (A. 176). Given that purpose, the Commission concluded that it is unreasonable to require "formal monitoring" if "it can be reliably predicted from the physical circumstances that the concentration of VC will be well below 50 ppm" (A. 176). The Commission found that Western Electric's decision not to formally monitor the coil coating operation was based on "foresight"—on specific knowledge of the physical circumstances. Specifically, the Commission found Western Electric: (1) had physically monitored the highest VC-producing process in the plant and found it gave off only a negligible amount of VC; (2) knew how VC is released and could thus conclude that the coil coating process would also give off negligible amounts of VC. The Commission found "nothing in the record" which "casts doubt on the validity of this judgment, or on the good faith with which it was made" (A. 178). The Commission held:

"Under these circumstances, we cannot conclude that Western Electric violated a standard intended only to protect employees from grave danger" (A. 178).

Since it had concluded Western Electric had not violated the ETS, the Commission found it unnecessary to decide

⁸ The decision is unofficially reported at 4 OSHC 2021.

⁹ Chairman Barnako wrote the majority opinion for himself and Commissioner Moran; Commissioner Cleary dissented.

whether Hysol as used by Western Electric was a "fabricated product" and thus exempt under section 1910.93q-(a)(2).

The dissenting opinion concluded that the Standard required *physical monitoring* in every instance where VC is "released" (A. 181-182) even though it can be reliably predicted that any VC in the ambient air will be many times below the exposure level permitted by the Standard.

Summary of Argument

The Commission held that Western Electric did not violate 29 C.F.R. §1910.93q(c)¹⁰ when it was able to "reliably predict" without formal monitoring that VC emissions in the coil coating work area were substantially below the 50 ppm exposure limit specified in the Temporary Standard. The record fully supports the Commission's decision¹¹ and its interpretation of the standard is clearly reasonable and consistent with its purpose.¹²

¹⁰ The text of which is set forth in note 3, *supra*.

¹¹ The substantial evidence test is expressly prescribed in §11(a) of the Act as the standard for judicial review.

¹² This court has held that its role is to decide "whether the Commission's interpretation of the regulation is unreasonable and inconsistent with its purpose. *Brennan v. OSHRC & Underhill Construction Corp.*, 513 F.2d 1032, 1038 (2nd Cir. 1975); *Brennan v. OSHRC & Gerosa*, 491 F.2d 1340, 1344 (2nd Cir. 1974).

Many Courts of Appeal have held that the Commission's interpretation of the statute and regulations thereunder are entitled to substantial deference or are binding interpretations. *Brennan v. Gilles & Cotting, Inc. & OSHRC*, 504 F.2d 1255, 1261-1262 (4th Cir. 1974); *Intercounty Const. Co. v. OSHRC*, 522 F.2d 777, 779 (4th Cir. 1975); *Dunlop v. Rockwell International*, 540 F.2d 1283, 1287-1288 (6th Cir. 1976); *Brennan v. OSHRC & Republic Creosoting Co.*, 501 F.2d 1196, 1198-1199 (7th Cir. 1974); *Brennan & OSHRC v. Ron M. Fiegen, Inc.*, 513 F.2d 713, 715-716 (8th Cir. 1975).

The Commission's interpretation is based on the wording of the ETS which requires "monitoring" to determine if employees are exposed to "concentrations" of VC. Here, after Western Electric monitored for VC by checking, watching and observing the workplace, it reliably concluded that only negligible amounts or no amounts of VC would be released.¹³

The Commission's conclusion is also supported by another section of the ETS which provides that air samples of VC shall be analyzed by a method sensitive to 5 ppm.¹⁴ Under the Standard itself then, small amounts of VC, less than 5 ppm, would not be detected by formal monitoring. Thus, it is clear that the purpose of the standard is to assure that only amounts of VC *in excess* of 5 ppm are detected. Since, as the ALJ found, *no* VC was released into the ambient air, the Commission's conclusion is clearly reasonable and consistent with the specific language and purpose of the Standard.

Finally, since the Hysol used by Western Electric is a "fabricated product" and thus specifically exempted from the ETS, Western Electric was not required to monitor the process in any way.¹⁵ A "fabricated product" is defined in the Permanent VC Standard as a PVC product which is not heated during use to cause "mass melting." Since the ALJ found that the Hysol mass was never heated, it was

¹³ The ALJ found that the Secretary's one ambient air sample detected *no* VC (A. 158-159). Accordingly, we submit that since no VC was released into the air, Western Electric was not required to monitor since the monitoring requirements are triggered only by the "release" of VC (A. 16; §1910.93q(c)).

¹⁴ A. 16; §1910.93q(c)(3).

¹⁵ The Commission did not reach this question (A. 179).

used by Western Electric as a "fabricated product" and its use was specifically exempted from coverage by the ETS.

ARGUMENT

The Commission's decision that Western Electric did not violate the monitoring requirement of the temporary VC standard is supported by substantial evidence and its interpretation of the ETS is reasonable and consistent with its purpose.

A. *The Evidence*

The undisputed evidence, the findings of the Administrative Law Judge, and of the Review Commission show that Western Electric had established a plan for complying with the newly promulgated VC standard, reviewed its plant operations to determine which ones emitted VC, and engaged in monitoring of the ambient air at the highest VC-producing process in the plant (A. 174, A. 177-178, A. 156, A. 157, A. 97-101). The air samples showed that the highest VC producing operation in the plant produced VC at the parts per *billion* (ppb) level, a "negligible amount" as the Commission found when compared to the 50 parts per *million* level¹⁶ specified in the temporary standard¹⁷ (A. 175, A. 157, A. 104).

Moreover, based on his knowledge of the coil coating operation and of how VC is released from PVC, Western

¹⁶ One part per billion is 1/1000 of a part per million. Thus, the level of 50 ppm specified in the standard would equal 50,000 parts per billion (A. 175, n.4).

¹⁷ It is also well below the one ppm provided in the later-promulgated permanent standard (29 C.F.R. §1910.93q(c)(1) (A. 25)).

Electric's resident expert¹⁸ at the Kansas City Works reliably concluded that, at the most, VC emissions into the ambient air would be in the ppb range. As the Commission reasoned:

"The record shows, however, that Western Electric's decision not to monitor the coil coating process was based, not on hindsight, but on foresight. It had monitored one operation which it thought was likely to result in a higher concentration of VC than the coil coating operation. It discovered that only a negligible amount of VC was released in the welding operation. This result, coupled with Western Electric's understanding of the process by which VC is released from PVC, strongly suggested that the amount of VC released in the coil coating operation would also be negligible compared to 50 ppm. Nothing in the record casts doubt on the validity of this judgment, or on the good faith with which it was made. Under these circumstances, we cannot conclude that Western Electric violated a standard intended only to protect employees from grave danger" (A. 177-178).

The Review Commission's factual findings are not merely supported by substantial evidence in the record but are uncontradicted by any record evidence. Accordingly, the Commission's decision clearly meets the test set forth in §11(a) and should be affirmed. *Olin Const. Co. v. OSHRC & Brennan*, 525 F.2d 464, 466-467 (2nd Cir. 1975).

¹⁸ His expertise was acknowledged by the U.S. Department of Labor at the hearing before the ALJ (A. 96-97).

B. The Commission's Determination That Respondent Western Electric Did Not Violate the Monitoring Provisions Rests on Its Reasonable Interpretation of the Standard and Is Not Erroneous

The Commission ruled that in light of the factual circumstances, Western Electric did not violate the temporary standard's monitoring provisions even though Western did not engage in formal monitoring of employees working at the coil coating operation. The Commission concluded that under the circumstances (described *supra*), Western was not required by the standard to engage in personnel monitoring since it could be reliably predicted from the conditions present at the Kansas City Works that VC was not present in the concentration specified in the standard. This interpretation by the agency charged with adjudication under the Act¹⁰ is clearly correct since, as we show below, it gives meaning to all parts of the standard and is the most reasonable interpretation. By contrast, the Secretary's interpretation—that personnel monitoring must always take place despite its futility—does not take into account the entire monitoring provision and is not reasonable. Moreover, because his interpretation of the language of the Standard has not been consistent, it is not entitled to deference here.

1. The Language of the Monitoring Provision and Purpose of the Standard Do Not Require Formal Monitoring

Under the Standard the employer is required to "begin monitoring the ambient air" to determine if "concentrations

¹⁰ Sec. 2(b)(3); 29 U.S.C. §651(3). The Commission members are required by the statute to be particularly qualified in matters of safety and health. Section 12(a) provides: "The Commission shall be composed of three members . . . who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act."

in excess of 50 ppm" exist in the workplace.²⁰ Western Electric did just that; by checking, watching and observing, it determined that the ambient air in the workplace did not contain VC "concentrations."²¹

The Commission concluded, that the purpose of monitoring was to determine whether an employee was exposed to "grave danger"²² because the work area contained "concentrations" of VC in excess of 50 ppm. Such a determination can easily be made without formal monitoring where, as here, it was reliably predicted from other checks and observations that the work area would contain no more than a negligible amount of VC. Thus, an employer under the Commission's reasonable interpretation is not required to perform the "useless act" of formal or personnel monitoring when other monitoring or checking produces an equally reliable result (A. 176). As the Commission aptly concluded:

²⁰ See text of ETS, *supra*, p. 3.

²¹ Webster's *New Collegiate Dictionary*, 1973 Ed. defines monitor as "checking," "watching" or "observing" to wit: "1. to check (as a radio or television signal or program) by means of a receiver for quality or fidelity to a band or for military, political, or criminal significance, 2. to test for intensity of radiations esp. if due to radioactivity, 3. to watch, observe, or check esp. for a special purpose, 4. to keep track of, regulate, or control the operation of (as a machine or process), 5. to check or regulate the volume or quality of (sound) in recording."

²² "It has been decided to promulgate a standard containing only those essential provisions which are deemed necessary to provide protection to employees from *grave danger* until a regular rule-making proceeding in accordance with sections 6(b) and (c) of the Act can be concluded." (Preamble to ETS, A. 15, emphasis added).

The standard was intended to protect employees, not to require monitoring for its own sake (A. 177).

This is a clearly reasonable conclusion which takes into account all parts of the ETS and is buttressed by knowledge of the physical processes by which VC is "released" from PVC. As the Commission noted, VC escapes from PVC at room temperature (A. 173). Thus, everything made of PVC emits VC on a continuing basis at least in minute amounts (A. 113).²³ As a consequence, personnel monitoring of the ambient air of every workplace using PVC would require enormous effort and much expense with no resulting increase in employee health or safety.²⁴

2. The Standard Does Not Cover the "Release" of Small Amounts of VC

The Secretary in promulgating the ETS did not contemplate detection of any concentrations of VC of less than 5 ppm. Thus, his standard as written supports the Commission's decision here. The Emergency Temporary Standard required that in personnel monitoring of the release of vinyl chloride, an employer must use an analytical procedure which has a sensitivity of 5 ppm.²⁵ Under the ETS

²³ For example Mr. Widner testified that common items such as telephones, plastic chairs and vinyl floor tile emit small amounts of VC on a continuing basis (S.A. 8; A. 113). S.A. references are to the Supplemental Appendix bound with this brief.

²⁴ It should be noted that both the ETS and the Permanent Standard exempt products fabricated from PVC, even though these products emit VC in small quantities.

²⁵ "The samples shall be analyzed by gas chromatography or by any other method which is of equivalent sensitivity. The analytical procedure shall be sensitive to 5 ppm of vinyl chloride in air with an accuracy of ± 20 per cent for a ten minute air sample" (A. 16; §1910.93q(c)(3), emphasis added).

if an employer formally monitored using a procedure of the required 5 ppm sensitivity, the ambient air of the workplace could contain up to 4.9 ppm of VC which, under the Secretary's own standard would go undetected. Surely the Commission's conclusion regarding reliable predictions of negligible amounts of VC is supported by the Secretary's judgment in the ETS that detection of small amounts of VC was not crucial to employee safety and health and was therefore not required by the Standard.

The facts here highlight the unreasonableness of the Secretary's interpretation of the Standard which would require personnel monitoring of all processes. Thus, if Western Electric had used personnel monitoring of the coil coating process by a method sensitive to 5 ppm it would have found nothing. The Department of Labor took one "ambient air" sample which detected *no VC* (A. 158-159 ALJ, Findings 19a, 21a and 22). In violation of the Secretary's own standard, his representative obtained his one positive VC reading from a sampling tube placed inside the closed Hysol tank, not in the "ambient air" as required by ETS. Even this reading (1.7 ppm) would not have been detected by an analytic procedure sensitive to the 5 ppm specified in the ETS.²⁶ Clearly, the Commission's interpretation draws its meaning from the entire standard. The

²⁶ In addition, the results of Western Electric's vigorous testing of the same Hysol casts doubt on the one positive VC finding obtained by the Secretary. Using a sophisticated measurement technique which the Secretary's witness admitted would be "99.9 per cent" accurate in identifying VC (A. 174; A. 95), Western obtained readings of no VC when the Hysol was at room temperature and when it was submerged in water heated to 50° centigrade. Only when the Hysol was subjected to boiling water were minute amounts of VC—.04 ppm—given off (A. 161; A. 145-147).

Secretary's interpretation is inconsistent with the language and specific purpose of his own standard.

**3. There Is No Proof That VC Was Released
Into the Ambient Air**

The ETS required employers in areas

"in which vinyl chloride is . . . released . . . [to] begin monitoring the ambient air to determine whether it contains vinyl chloride in concentrations in excess of 50 ppm" (A. 16, 29 CFR §1910.93q(c)).

By its very terms the ETS requires no monitoring of any kind unless VC is "released."

The ALJ found that no VC was actually "released" into the ambient air;²⁷ thus the Secretary did not prove that essential element of his case.²⁸

Supporting such plain meaning is the Commission's recent holding that monitoring an air contaminant (asbestos) under a similar standard is not required unless the contaminant is actually released into the air. Proof merely of a possibility of release is not sufficient to meet the Department of Labor's burden. As the Commission held:

"The standard does not rely, however, on the mere possibility of release before triggering the monitoring requirement. It requires monitoring only 'where asbestos fibers *are released*' (emphasis added). Complain-

²⁷ Thus, he found that the only ambient air sample yielded no VC (A. 158-159. Findings 19a, 21 and 22).

²⁸ The Commission did not reach this point because it concluded that even if VC had been released into the air, Western Electric had complied with the monitoring provisions of the Standard (A. 175).

ant has the burden of proving that the standard was violated." (*Goodyear Tire & Rubber Co.*, 5 OSHC 1473, 1475)

Similarly, in this case, the standard requires "release" of VC before its monitoring requirements are triggered.

In reaching its decision below the Commission assumed without deciding that VC had been "released." However, the record clearly shows that VC was not "released" into the "ambient air." In fact the ALJ found that the Department's ambient air sample measured no VC (A. 158-159, Findings 19a, 21 and 22). Moreover, the Department's one positive finding, analyzed at 1.7 ppm (A. 159 ALJ Finding 21b) was not taken from the ambient air but was taken *inside* the Hysol tank *with the cover closed* (A. 159 ALJ Findings 19b and 21).

Not only was this one positive sample not an ambient air sample as required by the standard, but another sample, taken at the same time and at the same spot measured *no* VC. The Department's witnesses had no explanation for this contradictory result—two samples taken under identical conditions, one finding 1.7 ppm VC and one finding nothing. Western Electric submits that the one sample which gave a positive VC reading resulted from the interference of hydrocarbons with the accuracy of the gas chromatographic analysis performed on the Department's sample tubes. Thus, Western Electric showed there were hydrocarbons present in the immediate area of the coil coating operation²⁹ and showed that the hydrocarbons could

²⁹ Mr. Widner pointed out that epoxies, chemicals and cleaning solvents containing hydrocarbons were present in the immediate area of the coil coating operation which could have distorted the analysis (A. 118).

well have been misread as VC gas in the gas chromatographic analysis.³⁰

In any event, as the ALJ found, no VC was released into the "ambient air" and therefore the standard's monitoring requirements were not triggered into operation. Since no VC was released, Western Electric was not required to conduct any kind of monitoring.

4. The Secretary's Interpretation Here Is Entitled to No Deference and Is Unreasonable Since It Is Inconsistent With His Later Interpretation

This court has made it clear that it will not rely solely on the Secretary's interpretations of his own regulations. As the Court noted in *Brennan v. OSHRC & Underhill Const. Corp.*, 513 F.2d 1032, 1038 (2nd Cir. 1975):

"[We] by no means [will] look solely to the Secretary for interpretation of the standards he promulgates."³¹

³⁰ In the gas chromatographic process, a sample of gas is put into solution and then driven out again under controlled conditions, different components separate out at different times. Vinyl chloride, for example, comes out after two minutes and traces a peak on the strip chart attached to the chromatograph (A. 84). Thus, any other substance with a two minute retention time would also register at two minutes and would distort the measurement of the volume of VC present, if any.

One of Western Electric's witnesses, a Research Chemist at its Engineering Research Center, confirmed that some hydrocarbons have the same retention time as vinyl chloride and showed its distorting effect on the strip chart readout from the gas chromatograph (A. 138-139).

³¹ Moreover, as the Court in *Brennan v. Gilles & Cotting, Inc.*, *supra*, pointed out, deferral to the Secretary "would mean that the Commission would be little more than a specialized jury, an agency charged only with fact finding. But, as we read the statute, the Commission was designed to have a policy role and its discretion therefore includes some questions of law." 504 F.2d at 1262.

In fact, here his interpretation is entitled to no weight at all since he has in subsequent opinion letters interpreted the very words—release of vinyl chloride—differently than he has in this case. Here, the Secretary has taken the position that “release” of any amount of VC³² means the escape of any amount of VC, however small. He specifically disagrees with the Commission’s conclusion that the release of a negligible amount of VC is insufficient to trigger the monitoring requirements of the ETS.

However, in several opinion letters written in late 1975 interpreting the Permanent Standard, the Secretary took the opposite position and adopted the view that “release” of VC means escape of enough VC to approach the action level,³³ which under the ETS would have been 50 ppm. Specifically, he said in his letters:

“‘Release of vinyl chloride’ means the release of an amount of vinyl chloride *which would likely result in employee exposure at or above the action level . . .*” (emphasis added)³⁴ (S.A. 3, 7).

³² Except by “fabricated products.”

³³ The “action level” of the Permanent Standard corresponds to the “permissible exposure limit” of the ETS.

³⁴ These letters are included as appendices to this Brief and are designated S.A. 3-7. These letters were brought to the attention of the Review Commission by letter of February 17, 1976, (S.A. 1-2) immediately after they came to Western’s attention. The letters were signed by Barry J. White, Associate Assistant Secretary for Regional Programs and were in response to questions from industry representatives regarding the meaning of “fabricated product” in the Permanent Vinyl Chloride Standard. It is clearly appropriate for this Court to take judicial notice of these letters as official interpretations by the Secretary of Labor who is charged with enforcement of the Standards. *Colonial Airlines v. Janas*, 202 F.2d 914, 918-919 (2nd Cir. 1953); *U.S. v. Rice*, 176 F.2d 373, 374 (3rd Cir. 1949); *Dispatch, Inc. v. City of Erie*, 364 F.2d 539, 540 (3rd Cir. 1966); *Southern Louisiana Area Rate Cases v. FPC*, 428 F.2d 407, 438 (5th Cir. 1970).

Thus, in 1975, the Secretary concluded that VC is "released" only if the concentration of VC "*would likely* result in employee exposure at or above the action level." In this case such an interpretation would mean no VC was "released" and thus no monitoring would be required until 50 ppm of VC escaped into the air. Yet, the Secretary here attacks the Commission's reasonable interpretation that release of "negligible amounts," nowhere near 50 ppm, does not trigger the monitoring requirements.

The Secretary's inconsistent interpretation in this case is thus clearly not entitled to any deference (*General Electric Co. v. Gilbert*, 429 U.S. 125, 142-143 (1976)).³⁵ Rather, it is shown to be unreasonable by his own subsequently adopted interpretation which supports, in part, the Commission's conclusion that release of small or negligible amounts of VC will not trigger the monitoring requirements of the ETS.

C. *The Hysol Used by Western Electric in Its Coil Coating Process Was a "Fabricated Product" Within the Meaning of the Emergency Vinyl Chloride Standard, and Thus the Standard Is Inapplicable by Its Specific Terms (§1910.93q(a)(2))*

In addition to the ground relied upon by the Commission to vacate the citation, its decision is also supported by the Standard's specific exemption from coverage for "fabri-

³⁵ On pp. 21-22 of his Brief the Secretary seeks to obtain deference to his interpretation on the spurious ground that since the Second Circuit has already decided the validity of the Permanent VC Standard, any of the Secretary's interpretations of the Standard cannot be questioned. The simple answer is that the Secretary's interpretations of his Standard were never before the Court: the Court determined only that the Secretary's promulgation of a Standard was supported by substantial evidence. *Society of Plastics Ind. v. OSHA*, 509 F.2d 1301 (2d Cir. 1975), cert. den. 421 U.S. 992.

cated products.”³⁶ While “fabricated products” are not defined in the ETS, the Permanent Standard³⁷ which also excludes them from coverage does define them:

“‘Fabricated product’ means a product made wholly or partly from polyvinyl chloride, and which does not require further processing at temperatures, and for times, sufficient to cause mass melting of the polyvinyl chloride resulting in the release of vinyl chloride” (§1910.93q(b)(6) A. 25).

Clearly, the Hysol used by Western Electric was a “fabricated product” within the definition since it did not require processing at temperatures and at times “sufficient to cause mass melting.” Contrary to the erroneous statement in the Secretary’s Brief (p. 8), the Hysol mass in the tank was *never heated* during the process to anywhere near its melting point of 350° Fahrenheit, and the mass of Hysol never reached its fusion temperature. The only heat source was forty-nine heated coils which were dipped into the room temperature Hysol and allowed to cool. The mass of Hysol itself was never heated or subjected to temperatures which would cause it to melt (A. 157-158; 159-169; ALJ findings 13 and 25). Accordingly, Hysol was a “fabricated product” and its use by Western Electric specifically fell outside the Standard.

³⁶ The Emergency Temporary Standard provided: “This section does not apply to the handling, storage, or other use of vinyl chloride polymers and copolymers in the form of fabricated products” (§1910.93q(a)(2) A. 16).

³⁷ The Permanent Standard exempts fabricated products: “This section applies to the manufacture, reaction, packaging, repackaging, storage, handling or use of vinyl chloride or polyvinyl chloride but does not apply to the handling or use of fabricated products made of polyvinyl chloride” (§1910.93q(a)(2) A. 25).

CONCLUSION

For the foregoing reasons, the Review Commission's decision should be affirmed.

Respectfully submitted,

ROBERT A. LEVITT

LAWRENCE M. JOSEPH

LAUREL J. MCKEE

Attorneys for

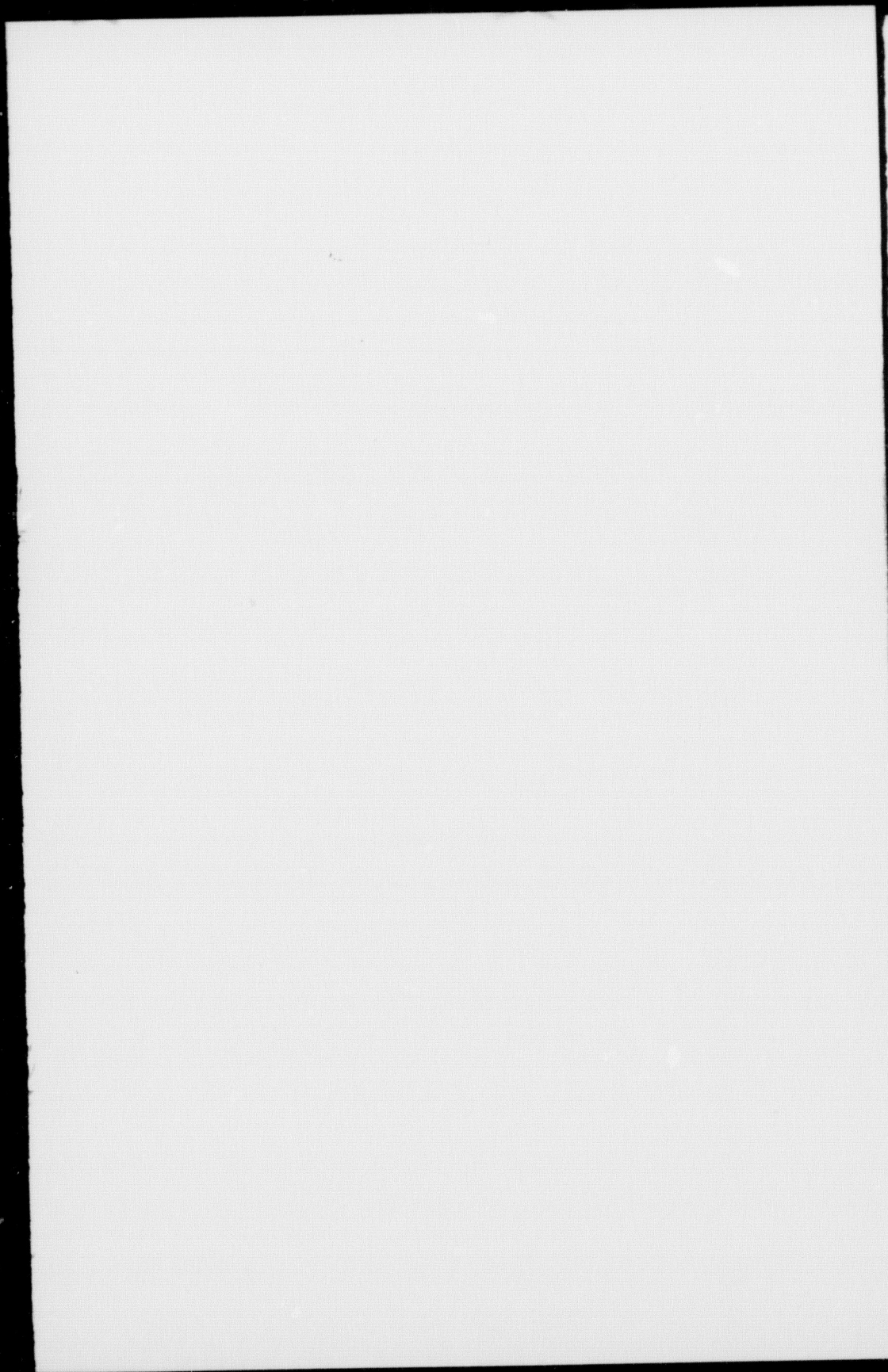
Western Electric Company, Inc.

222 Broadway

New York, New York 10038

August 26, 1977

SUPPLEMENTAL APPENDIX



SA 1

(Letterhead of Western Electric, 222 Broadway.
New York, N. Y. 10038)

February 17, 1976

MR. WILLIAM S. McLAUGHLIN
Executive Secretary
Occupational Safety and Health
Review Commission
1825 K Street, N.W.
Washington, D. C. 20006

Re: Secretary of Labor v. Western Electric
OSAHRC Docket 8902

Dear Mr. McLaughlin:

Attached are three copies of this letter and two letters from Barry J. White, Associate Secretary for Regional Programs, Occupational Safety and Health Administration, which I ask you to file and bring to the attention of the Commission. In the letters, Mr. White adopts in large part, one of the positions argued by Western Electric in this case.

Mr. White interprets the meaning of the word "released" in the vinyl chloride standard. He states:

"'Release of vinyl chloride' means the release of an amount of vinyl chloride which would likely result in employee exposure at or above the action level. . . ."

This interpretation is close to the one advocated by Western Electric in this case and *contrary* to that argued by the Solicitor. Western Electric has argued that vinyl chloride is "released" only if the amount of vinyl chloride emitted is greater than the required sensitivity of the instrument used to measure the vinyl chloride gas. The required sensitivity of the measuring instrument was 5 ppm in the temporary vinyl chloride standard under which this case arose. The Solicitor has argued that any measurement of vinyl chloride means the gas is "released" within the meaning of the standard.

Mr. White's interpretation is less restrictive than Western Electric's and defines "release" to mean an "amount which would likely result in employee exposure at or above the action level." His interpretation would mean that under the temporary vinyl chloride standard, the measurement of vinyl chloride would have to approach 50 ppm before vinyl chloride was "released" within the meaning of the standard. The Administrative Law Judge found as a fact in this case that the release of vinyl chloride was 1.7 ppm in the one definite reading obtained. Therefore, there clearly was no "release" of vinyl chloride under the interpretation of the Occupational Safety and Health Administration.

In view of this official interpretation of the word "released" in the vinyl chloride standard, Western Electric,

SA 3

again, requests that the decision of the Administrative Law Judge be reversed.

Very truly yours,

LAUREL J. McKEE
Attorney

Att.

Copy to:

Arthur Amchan, Esq.
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D. C. 20210

SA 4

(Letterhead of U.S. Department of Labor, Occupational
Safety and Health Administration,
Washington, D. C. 20210)

MR. R. R. WHEELER, JR.
Vinyl Chloride Resins Manager
Union Carbide Corporation
270 Park Avenue
New York, New York 10017

Dear Mr. Wheeler:

This is in response to your joint letter with Mr. John Whittlesey dated June 17, 1975, petitioning for modifications of the Exposure to Vinyl Chloride Standard, 29 CFR 1910.1017 (formerly 1910.93 recodified May 28, 1975).

There are no plans presently to amend the Vinyl Chloride Standard. A revised program directive is contemplated, although we are not certain as to the date it will be available. Please be assured that your comments and suggestions are greatly appreciated and they will be considered fully in the revision of the program directive. In the meantime, the following administrative decisions have been made:

1. 29 CFR 1910.1017(a) and (b)(6) Scope and application (2), (3) and (b) Definitions (6)

The standard defines a fabricated product as being one which is "made wholly or partly from polyvinyl chloride, and which does not require further processing at temper-

atures, and for times, sufficient to cause mass melting of the polyvinyl chloride resulting in the release of vinyl chloride."

"Release of vinyl chloride" means the release of an amount of vinyl chloride which would likely result in employee exposure at or above the action level without regard to the use of engineering controls. Products which can be classified as fabricated products are exempt from the provisions of the vinyl chloride standard. All other products are subject to the requirements of the standard. If the employer uses or manufactures a product which is not a fabricated product, he must initiate monitoring procedures. If the monitoring reveals that the employees are not exposed to vinyl chloride at or above the action level, the employer's operations will be exempt from the provisions of the standard. However, if the monitoring reveals exposure at or above the action level, the employer must implement the procedures specified in the standard.

2. 29 CFR 1910.1017(b) Definitions (5).

The petition requests that the definition of "emergency" be revised to include specific examples, such as fire and explosion. We agree that the definition might well be expanded to include examples. Again, this matter will be addressed in a program directive and not as an amendment to the standard.

The definition of a "massive release" as being "greater than 100 parts per million (ppm)" found in the current Program Directive #200-35, will also be addressed in a revised directive. We agree that the 100 ppm should be changed.

3. 29 CFR 1910.1017(d) Monitoring (4)

The intent of paragraph (d)(4) is that the employer shall be 95% confident that his monitoring result is within 25%, 35% or 50% of the actual value depending on the concentration. Therefore, an employer using a method which has proven vinyl chloride detection accuracy of 25% or less need take only one measurement regardless of the actual vinyl chloride monomer concentration. In concentration ranges where accuracies of 35% or 50% are required, the employer need take only one measurement if the method accuracy is less than the specified accuracy. With methods of unknown accuracy or having errors greater than the specified accuracy requirements, repeated measurements are necessary. In these cases, one may use the coefficient of variation (CV) as a parameter to judge whether or not a sampling procedure is adequate to meet the standard. The CV in percentage units is defined as the standard deviation of the method, times 100, divided by permissible exposure limit. The required CV of the procedure is obtained by dividing the required accuracy by 1.96 (Z value for 95% confidence). Thus, for accuracies of 25%, 35% and 50%, method CV values should be less than 12.8%, 17.9%, and 25.5% respectively.

To repeat, there are no plans presently to amend the standard but your comments on monitoring will be considered in the program directive revision and also in future rulemaking where monitoring is a requirement.

4. 29 CFR 1910.1017(j) Training.

The standard does not specify a level of exposure to trigger training activities. Section 6(b)(7) of the Occupational Safety and Health Act of 1970 provides that

employees shall be appraised of the nature of the hazardous substances with which they come in contact.

The evidence we have compiled on vinyl chloride has indicated that it is sufficiently hazardous to warrant training for all personnel who have any possibility of coming in contact with vinyl chloride. There is always the opportunity for accidents to occur and employees should be aware of the possible consequences. There has also been some indication that storage containers may yield high concentrations of vinyl chloride when opened after transporting.

Therefore, it is not likely that the training provisions will be amended. For those operations covered by the standard, training is a requirement.

5. 29 CFR 1910.1017(e), Signs and labels (4)

If there are situations where the blended polyvinyl chloride must be labeled yet contains less than 0.5 ppm residual vinyl chloride monomer, the following wording may be used:

BLENDING POLYVINYL CHLORIDE (PVC)

CONTAINS TRACE AMOUNTS (0.5 ppm)
OF VINYL CHLORIDE.

VINYL CHLORIDE IS A CANCER-SUSPECT AGENT.

We hope that the above clarifications will satisfy your petition for modification and amendment of the vinyl chloride standard. As previously stated, there are no plans presently to formally amend the standard. There will be an addendum or modification of the Program Directive #200-

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35. Should you wish to discuss any matter further do not hesitate to contact me or members of my staff.

Sincerely,

/s/ BARRY J. WHITE

Barry J. White

Associate Assistant Secretary
for Regional Programs

(Letterhead of U.S. Department of Labor, Occupational
Safety and Health Administration,
Washington, D. C. 20210)

Mr. Raymond H. Schenck
Attorney
Air Products and Chemicals, Inc.
Five Executive Mall
Swedesford Road
Wayne, Pennsylvania 19087

Dear Mr. Schenck:

This is in response to your letter of June 30, 1975 to Assistant Secretary John H. Stender petitioning for the modification of 29 CFR 1910.1017(b)(6), (formerly 29 CFR 1910.93q(b)(6) recodified May 28, 1975), Exposure to Vinyl Chloride, Occupational Safety and Health Standards.

29 CFR 1910.1017(b)(6) defines a fabricated product as being one which is "made wholly or partly from polyvinyl chloride, and which does not require further processing at temperatures, and for times, sufficient to cause mass melting of the polyvinyl chloride resulting in the release of vinyl chloride."

"Release of vinyl chloride" means the release of an amount of vinyl chloride which would likely result in employee exposure at or above the action level without regard to the use of engineering controls. Products which can be classified as fabricated products are exempt from the provisions of the vinyl chloride standard. All other products are subject to the requirements of the standard.

SA 10

There are no plans presently to formally modify the vinyl chloride standard. Therefore, we hope that the above clarification of the regulation will satisfy your petition request.

Should you have further questions, please contact me or members of my staff.

Sincerely,

/s/ BARRY J. WHITE

Barry J. White

Associate Assistant Secretary
for Regional Programs

contains, regardless of our semantical differences here, vinyl chloride or polyvinyl chloride at the Western Electrical facility in Lee's Summit that you have not monitored?

A. Would you please state that again?

Q. Was there any other substance in the Western Electric facility at Lee's Summit containing either vinyl chloride or polyvinyl chloride resin that you have not monitored?

A. Vinyl chloride or polyvinyl chloride resin can—you say containing?

Q. Regardless of our semantical differences of raw material or otherwise?

Judge Dixon: Other than Hysol, is there any other material that you have that has the constitual elements of vinyl chloride or polyvinyl chloride?

The Witness: We have numerous clients who have telephones that have polyvinyl chloride in them. Every telephone has polyvinyl chloride parts.

These chairs probably have it in them. It's probably polyvinyl chloride floor tile too.

Q. (By Mr. DeShazo) What's the reason, again maybe I should be asking Mr. Rasmuson, what is the purpose of pumping nitrogen gas over into a Carbosieve trap where you have collected the vinyl chloride? A. My understanding is to remove any moisture laden



Western Electric

Laurel J. McKee
Attorney

222 Broadway
New York, N. Y. 10038
212 571-6458

August 26, 1977

A. DANIEL FUSARO, ESQ.
Clerk,
United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Marshall v. Western Electric and OSHRC,
(C. A. 2, No. 77-4076)

Dear Mr. Fusaro:

Enclosed are ten (10) copies of the Brief for Respondent Western Electric Company, Inc. in this case and a certificate of service of the Brief on counsel of record.

Very truly yours,

Laurel J. McKee
LAUREL J. McKEE
Attorney

Encl.

Copy to:
Dennis K. Kade, Esq.
Department of Labor
Washington, D.C.

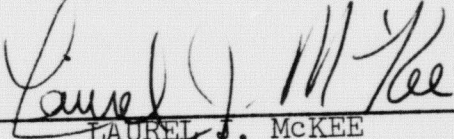
Allen Sachsel, Esq.
Appellate Section
Civil Division
Department of Justice
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 1977
copies of the Brief for Respondent Western Electric
Company, Inc. were served by appropriate mailings,
postage prepaid on the following counsel of record:

Dennis K. Kade, Esq.
Department of Labor
Washington, D. C.

Allen Sachsel, Esq.
Appellate Section - Civil Division
Department of Justice
Washington, D. C.


LAUREL J. MCKEE
Attorney